IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,

Respondent.

In Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR AARON COPLAND, *et al.*, AS *AMICI CURIAE*

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BRIEF FOR AARON COPLAND, *et al.*, AS *AMICI CURIAE*

Aaron Copland, *et al.*, submit this brief as *amici curiae* in support of the petition for certiorari to review the judgment entered by the Court of Appeals for the Second Circuit on August 8, 1977. Eubie Blake, Sammy Cahn, Betty Comden, Hal David, Ira Gershwin, Adolph Green, Gian Carlo Menotti, Vincent Persichetti, Ned Rorem, William E. (Billy) Taylor, Virgil Thomson, and the Estates of Bela Bartok, Edward Kennedy (Duke) Ellington and Igor Stravinsky join in this brief as *amici curiae*. Consent to submit this brief has been obtained from all parties and their letters have been lodged in the clerk's office of this Court.

Interest of *Amici Curiae*

The *amici curiae*, Aaron Copland, *et al.*, are composers of music, authors of lyrics for music, and members of the American Society of Composers, Authors and Publishers (ASCAP). These *amici curiae* have interests in this litigation of several kinds.

The decision of the panel majority of the Court of Appeals for the Second Circuit to the effect that ASCAP's method of licensing performance rights for the *amici curiae's* copyrighted works constitutes price fixing, which is illegal per se under Section 1 of the Sherman Act, may be read to mean that *amici* and other members of ASCAP were parties to an illegal combination. *Amici* may be exposed to treble damage liability and may have to incur literally ruinous legal expenses in defending themselves. *Amici* have, therefore, a great personal interest, quite apart from their interest in ASCAP's survival and effectiveness, in a prompt appellate determination by this Court of the novel per se rule fashioned by the court of appeals.

The per se rule created by the court of appeals majority, if it were applied according to its apparent rationale, would appear not only to outlaw blanket licensing but any form of licensing that an organization like ASCAP could engage in. If that were to happen, and if ASCAP were effectively destroyed, these *amici* and other current members of ASCAP and BMI would be left without effective means of seeing that royalties were paid for the performance of their works by the tens of thousands of users of music in the United States. Composers, authors, and publishers would be thrown back to the unhappy condition in which they existed prior to the organization of ASCAP. The copyright laws of the United States gave such composers, authors, and publishers of music the legal right to receive royalties for the performance of their works but that legal right was largely worthless because of the utter impossibility of private individuals learning of all such performances and either negotiating satisfactory licenses or suing for infringement. *Amici* and others similarly situated would be legally and practically helpless to protect themselves and their means of livelihood.

If the new per se rule, and the accompanying decision that *amici's* copyrights have been misused, is not promptly reviewed, it is entirely possible that ASCAP will be financially destroyed by antitrust and misuse litigation with myriads of licensees all over the United States. This may happen even though ASCAP should ultimately prove correct on the legal issue. This result would also leave composers, authors, and publishers helpless to enforce their legal rights under the copyright laws until such time as a new organization could be created and put into operation. *Amici* would lose heavily both as a result of the costs imposed upon ASCAP and as a result of the absence, even if temporary, of an effective licensing and policing organization.

Questions Presented

1. Whether the diminution of price competition that necessarily occurs within any joint venture or other economic integration, such as a partnership or corporation, is per se illegal under Section 1 of the Sherman Act.

2. Whether an antitrust court has authority to enjoin one form of distribution, here blanket licensing, and order as a remedy another form of distribution, per use licensing, when per use licensing does not eliminate or reduce the illegality the court perceived and hence cannot be preferred to blanket licensing by the Sherman Act.

Statement of the Case

Respondent Columbia Broadcasting System, Inc. (CBS), filed an antitrust action against petitioners ASCAP, Broadcast Music, Inc. (BMI), and certain individual members of each organization, alleging that the use of blanket licenses by ASCAP and BMI violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2. A blanket license is one by which ASCAP for a stated term and royalty authorizes the licensee to perform any copyrighted work that ASCAP has the right to license. CBS alleged that price competition was eliminated between members of ASCAP, that licensing copyrights not used with those that were used constituted an illegal tie-in, that by dealing through ASCAP copyright owners were engaged in a concerted refusal to deal, and that ASCAP had attempted and achieved monopolization. CBS also charged that these activities constituted copyright misuse. CBS sought only injunctive and declaratory relief.

The district court severed the issues of liability and relief and, after a nonjury trial of liability, held that the defendants had not violated the Sherman Act and had not misused their copyrights. It dismissed the complaint. The opinion of the district court is reported at 400 F. Supp. 737.

The court of appeals opinion, reported at 562 F.2d 130, held that none of the district court's extensive findings of fact were "clearly erroneous," unanimously affirmed the holdings that the defendants had not engaged in any of the illegalities charged, with one exception. A majority of the three-judge panel held as a matter of law on the facts found by the district court that the blanket license involves price fixing and so is rendered illegal per se by Section 1 of the Sherman Act as interpreted by *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940). The copyrights were held to have been misused for the same reason. Price fixing was held to exist because members licensing through ASCAP did not engage in price competition with one another but shared in the proceeds of the license. The majority held further that there is a defense to price fixing that would otherwise be illegal where the price fixing "is absolutely necessary for the market to function at all," 562 F.2d at 136. The defense was held unavailable here because CBS could obtain licenses directly from individual copyright owners, a right guaranteed by ASCAP's consent decree with the government.

The case was remanded for consideration of a remedy consisting of "some form of per use licensing," 562 F.2d at 140. A per use license involves a royalty payment for copyrighted works actually performed. The majority stated, however, that the blanket license, which it had held illegal per se, need not be prohibited in all circumstances. "The blanket license is not simply a 'naked restraint' ineluctably doomed to extinction," because some licensees might find it desirable, 562 F.2d at 140. The court also indicated that the "market necessity" defense might per-

mit blanket licensing with respect to some classes of licensees, apparently without regard to their desires.

The concurring judge stated that he agreed that a remand for remedy proceedings was proper so that a practical method of adding per use licensing could be evolved, but added, "I do not agree that 'the ASCAP blanket license in its present form is price-fixing and with respect to the television networks cannot be saved by a "market necessity" defense,'" 562 F.2d at 141. This appears to be a statement that ASCAP has not violated the law but that relief should be granted to CBS.

Reasons for Granting the Writ

I. There is a conflict between the Circuits and further conflicts are almost certain to occur.

The decision of the court of appeals majority in this case is in direct conflict with the decision of the Court of Appeals for the Ninth Circuit in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968). Though the majority in this case stated it had no quarrel "with the *result* reached by the Ninth Circuit in *K-91*," 562 F.2d at 138 (emphasis in the original), the majority made it very clear that it rejected the legal rule enunciated by the Ninth Circuit. That rule would have required judgment for ASCAP here.

K-91 arose when several copyright owners sued a radio station operator for copyright infringement because the operator, K-91, had played their musical compositions on the air without the owners' permission or consent. *K-91* raised

antitrust charges, including an allegation that ASCAP and the copyright owners, who were members of ASCAP, had conspired to fix prices in violation of Section 1 of the Sherman Act. The antitrust charges were raised both as a defense of misuse and as a basis for a counterclaim seeking triple damages. The district court ruled for the copyright owners.

The court of appeals affirmed:

> We agree with the trial court that the activities of ASCAP do not constitute a combination in restraint of trade or a monopoly within the meaning of the Sherman Act. . . . ASCAP cannot be accused of fixing prices because every applicant to ASCAP has a right under the consent decree to invoke the authority of the United States District Court for the Southern District of New York to fix a reasonable fee whenever the applicant believes that the price proposed by ASCAP is unreasonable, and ASCAP has the burden of proving the price reasonable. In other words, so long as ASCAP complies with the decree, it is not the price fixing authority. . . . In short, we think that as a potential combination in restraint of trade, ASCAP has been "disinfected" by the decree.
>
> There is an additional reason why the activities disclosed by this record do not violate the antitrust laws. ASCAP's licensing authority is not exclusive. The right of the individual composer, author or publisher to make his own arrangements with prospective licensees, and the right of such prospective licensees to seek individual arrangements, are fully preserved.

372 F.2d at 4.

A majority of the Court of Appeals for the Second Circuit in the present case, however, explicitly disagreed with

the Ninth Circuit on these points. The Second Circuit majority held that the decree did not help ASCAP since a district court determination of a "reasonable" price did not change the fact that a combination (ASCAP) had fixed the price and that reasonableness was no defense to price fixing. The Ninth Circuit's point, however, had been that when the district court set the royalty, ASCAP was not fixing the price, and the prospective licensee had the option of getting the court to do just that in every instance.

Despite the fact that the Ninth Circuit found the right of prospective licensees and individual copyright owners to deal directly to be an additional reason why ASCAP did not violate the antitrust laws, the court of appeals here suggested that no such competitive market had been available in the circumstances of *K-91*, and went on to say that the very fact that such direct dealing was possible here meant the availability of a judicially supervised price did not serve to acquit ASCAP of price fixing.

Though the Second Circuit Court of Appeals majority distinguishes *K-91* by relying on a stipulation of the parties that no direct dealing of licensees and owners was possible there, the Ninth Circuit made no mention of that stipulation, and the legal rules enunciated by the two circuits are in diametric opposition.

This Court, we submit, should resolve this conflict between the circuits, particularly because the correct legal rule is of enormous importance to a vast industry. For years, the entire industry has operated on the assumption that the consent decree, which has been intensively negotiated and amended from time to time, stated the application of the antitrust laws to this complex industry. *K-91* gave

additional good legal ground for that belief. The present case, which conflicts with *K-91*, has thrown the situation into turmoil. Other litigation is beginning because of the Second Circuit's ruling, and it appears certain that there will shortly be more conflicts between the circuits, adding to the unsettled condition of the industry.

II. The decision of the court of appeals rests upon serious misinterpretations of the Sherman Act that are apparent on the face of its opinion.

There is no dispute over facts but merely a clearcut legal issue. The court of appeals held that the findings made by the district court, which were not clearly erroneous, disposed of the charge that ASCAP's blanket license involved an illegal tie-in or block-booking. The two judge majority held, however, that the blanket license involves price fixing which is made illegal per se by Section 1 of the Sherman Act. It therefore remanded for remedy proceedings for the purpose of requiring ASCAP to offer per use licensing as well as blanket licensing.

There are several legal anomalies in this reasoning, but we regard two propositions as each dispositive and requiring reversal. First, the court of appeals majority ruled that the illegality arose because, when they license through ASCAP, composers, authors and publishers do not compete on royalty rates. But that fact does not constitute illegal price fixing within any known interpretation of Section 1 of the Sherman Act. It cannot be held per se illegal without condemning other, obviously lawful, forms of economic activity. Second, if blanket licensing were thought to be price fixing, the principle that so defined it would be at least equally applicable to per use licensing, or indeed to

almost any licensing an organization like ASCAP could engage in. A court purporting to act under the antitrust laws lacks power to order a change from one form of distribution to another when the former is, at worst, identical in the contemplation of those laws.

A. ASCAP's blanket license does not involve price fixing.

The panel majority's opinion shows on its face that it thought price fixing was involved not merely in ASCAP's blanket license but in almost any conceivable activity of ASCAP as an agent for composers, authors, and publishers. (The concurring judge took the curious position that ASCAP had not violated the law but that relief should be entered against it.) The majority stated:

> The charge that there is a restraint of trade by price fixing is founded upon the conception that when any group of sellers or licensors continue to sell their products through a single agency with a single price, competition on price by the individual sellers has been restrained. When the single price includes compensation even for those in the combination whose wares are not used, it may be said that the single price has been increased to take care of such compensatory factors which are irrelevant to true competition. But even if the single price is *reasonable,* the determination of how much each copyright owner gets from the common pot is an artificial fixing of the price to that member of the combination for his composition.

562 F.2d at 137-38 (emphasis in the original).

The majority concluded that there existed, therefore, a combination which tampers with price structures and thus engages in unlawful activity within the meaning of *United*

States v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 221 (1940). It continued:

> There is no doubt that when ASCAP issues a blanket license, the royalty received by the individual writer or publisher is the result of at least the threshold elimination of price competition for the performing rights in his own particular composition . . . .

562 F.2d at 136.

It is to be noted that the court of appeals' "price fixing" rationale has nothing to do with the form of licensing used by ASCAP; it is an objection to ASCAP determining the compensation of its members, and that objection would apply unless members bid competitively through ASCAP to get their works performed.

Though it is not the case that ASCAP pays compensation to those whose "wares" or copyrights are not used (most members never receive an ASCAP check), the clear legal error of this reasoning lies in applying to an economic integration, or joint venture, the rule of per se illegality appropriate to cases like *Socony-Vacuum,* involving a naked restraint, where the suppression of competition is the sole object of the combination. ASCAP, on the contrary, performs a vital and legitimate economic function that cannot be performed at all if no diminution of competition within the organization is permitted by law. In this, it resembles such familiar examples of economic integration as law firms and league sports. It makes no more antitrust sense to say that the Sherman Act forbids the existence of ASCAP than it would to say the law equally prohibits law firms or sports leagues.

ASCAP was created because individual composers, authors, and publishers were helpless to police the performance of their copyrighted works and thus did not realize the royalty income to which the law entitled them. ASCAP, therefore, took over the functions of licensing and policing that were utterly beyond the capabilities of individuals or smaller associations. Without ASCAP and BMI these functions would not be done. A law journal comment shows why:

> Without ASCAP, licenses for individual performances would have to be negotiated, and all performances would have to be policed by all composers. The costs would be enormous. A single radio station, for example, may broadcast as many as 60,000 performances of recorded musical compositions each year, involving as many as 6,000 separate compositions. As of 1975 there were 7,158 radio stations in the United States, as well as some 714 television stations and thousands of restaurants, bars, hotels, theaters, and other businesses that use ASCAP music. It has been estimated that there are now over one billion licensed performances of ASCAP music annually.*

That is why ASCAP, which is a clearinghouse for performing rights to copyrights held by 16,000 composers and authors and 6,000 music publishers, must exist. Moreover, there is within ASCAP all the competition between copyright owners that is possible. Each copyright owner is compensated through a complex formula that reflects the popularity of, and demand for, his product. If the owner's work is not performed, he is paid nothing. This highlights the essential dissimilarity between ASCAP and a

* Comment, "*CBS* v. *ASCAP*: Performing Rights Societies and the Per Se Rule," 87 Yale L.J. 783, 786 (1978) (footnotes omitted).

cartel in which the inefficient producer is guaranteed a share of the market and a profit in order to dissuade him from competing.

No more competition is possible within a joint venture in licensing and policing, which ASCAP is. The decree under which ASCAP operates provides that its members may deal individually with licensees. But it is both physically and commercially impossible for ASCAP itself to become a market resembling a stock exchange by keeping in continual communication with all of its members, advising them of every potential licensee's interests and asking for bids, advising again of competitive offers, and continuing the process until all bids were in and the licensee able to pick among them. Every successful composer, author and publisher would have to spend a substantial part of his day at a computer terminal receiving information about what every other member was asking and continually adjusting his own royalty demands. Though that is obviously impossible, it would be the only process that could avoid the court of appeals' ruling that there must be a competitive market inside a joint venture.

CBS has claimed that ASCAP, with modern computer technology, could run an internal market for CBS. ASCAP has denied that. But if we assume, solely for the argument here, that CBS is correct, it would make no difference under the law. On such an assumption, ASCAP might be able to run a computerized internal market for any one licensee of any type, but what has been said shows the impossibility of bringing copyright owners together in a bidding situation as to all licensees, or, indeed, for any large number of the tens of thousands of licensees. There

is no Sherman Act principle that CBS or any other licensee has a right to an internal bidding system that might, arguendo, be created for one but not for all. Every licensee would have an equally good claim and the law does not require that CBS be preferred.

In this inability to function and simultaneously provide a fully competitive market internally, ASCAP precisely resembles a major law firm. When clients come to a law firm with complex pieces of work, the firm assembles the talents of the lawyers at its call and determines the rewards of each. The panel majority's rationale would call that a combination that tampers with price structures and illegal per se under *Socony-Vacuum*. Presumably, in order to comply with the Sherman Act, the individual lawyers in the firm must bid against one another to work on every client's case.

The law has condemned naked restraints, it has had difficulty with ancillary restraints, but it has never, until now, made the mistake of condemning that diminution of competition which, of necessity, occurs within an economic venture such as a partnership or ASCAP. As Judge Taft put it at the outset of antitrust policy: "when two men became partners in a business, although their union might reduce competition, this effect was only an incident to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business, and one useful to the community." *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 280 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). Taft was talking not about ancillary restraints, which he discussed next, but about the inherent restraint that occurs whenever men cooperate in a useful economic function.

The rationale advanced by the two judges in the court of appeals, contrary to this ancient and sound learning, if applied consistently, would make any economic integration unlawful—not merely ASCAP and law partnerships but corporations, sports leagues, joint ventures, and family farms—because each is a combination of persons who could operate individually, yet, within the unit, are rewarded not by open market competition with one another but according to a determination made by the economic unit of how much each should receive. Any principle making that illegal is inconsistent not merely with antitrust but with even the most primitive economy. It is precisely what Justice Holmes warned against: "an interpretation of the law which in my opinion would make eternal the *bellum omnium contra omnes* and disintegrate society so far as it could into individual atoms." *Northern Securities Co.* v. *United States*, 193 U.S. 197, 411 (1904) (dissenting opinion).

The court of appeals majority struck down blanket licensing to CBS on a rationale that is irrelevant to blanket licensing but which would outlaw the existence of ASCAP and all other economic integrations.

B. Since per use licenses do not provide more price competition than blanket licenses, per use licenses are not preferred by the Sherman Act, and the court of appeals lacks authority to order per use licenses substituted for blanket licenses.

The objection voiced by the court of appeals majority, that under blanket licensing ASCAP sets the royalties to be paid copyright owners, applies as well to per use licensing. We have shown that the objection is really to the

existence of a performing rights society and, for that reason, no shift in license practices will eliminate the feature the majority below erroneously saw as price fixing. Thus, the per use license, which will require ASCAP to determine royalties, will necessarily involve that "threshold elimination of price competition" that the court of appeals held to be the vice of the blanket license.

The function of an antitrust remedy is to replace an illegal situation with a legal one, not to give the plaintiff his choice of distribution practices without regard to their respective legal statuses. Since blanket and per use licenses have the same characteristics with respect to ASCAP's determination of payments to copyright owners, they are either both lawful or both unlawful. If the blanket license is lawful, the court has no power to order the per use license substituted for it. If both licenses are unlawful, the court has no power to order either one used.

III. The legal error made by the court of appeals majority will have serious and widespread consequences.

The misconstruction of Section 1 of the Sherman Act by the court of appeals majority will have serious and damaging consequences to these *amici curiae*, the music industry and ASCAP, and to the administration of the Sherman Act. Such consequences include the following:

(a) Not only ASCAP and BMI but all of their members —composers, authors and publishers, including these *amici* —will be exposed to heavy legal costs in defending themselves against other lawsuits, and will be exposed as well to potentially ruinous triple damage liability. The fact that

CBS has so far not sought treble damages does not foreclose others. Even if the rule of the court of appeals majority is ultimately overturned and such cases defended successfully, as we are certain they would be, the legal costs alone could be devastating to individual composers and authors.

(b) The music industry has been plunged into turmoil because long-established licensing practices sanctioned by a decree with the government have suddenly been declared per se illegal in some but not all situations. No one knows where the practice may be used and where not. As the court of appeals, 362 F.2d at 140 n.26, stated:

> "In not reaching the same result as the Ninth Circuit did in *K-91*, we in no way, intimate that we would have held the blanket license to the single radio station to be unlawful, or that the blanket licenses given by ASCAP generally are unlawful. The *K-91* result was, in our view, entirely justifiable as an example of market necessity. Indeed, CBS concedes that market necessity would probably justify ASCAP blanket licenses for restaurants, night clubs, skating rinks and even radio stations."

CBS may concede it, but there is no reason to suppose that the great number and variety of licensees in this country will accept such a concession on their behalf, and the prospect is for almost endless litigation between ASCAP and its members, on the one hand, and, on the other, all types of licensees in all of the circuits of this nation until this Court ultimately settles the issue of the legality of ASCAP's licenses. Costs of litigation will be enormous and may prove prohibitive for ASCAP. If that happens, an organization on which composers and authors absolutely rely will have been destroyed by the confused opinion below.

But that prospect aside, licenses and fee arrangements will be disrupted for years to come.

This effect is multiplied by the court of appeals' statement, 562 F.2d at 141 n.29, that the copyrights licensed by ASCAP have been misused, a holding based upon the reasoning that led the court to conclude there is illegal price fixing and which must fall with that conclusion. Some licensees may not wish to initiate antitrust actions but may be willing to withhold license fees, wait to be sued, and defend on grounds of misuse. This has begun to happen already.

(c) A rule of per se illegality has been fashioned which is at once novel, clearly wrong, and capable of destroying ASCAP and any other organization formed to protect composers, authors, and publishers. That rule will predictably be raised in litigation attacking other forms of joint venture or necessarily cooperative forms of economic enterprise.

(d) In an apparent attempt to compensate for the obvious defects of its overbroad per se rule, the court of appeals majority invented a so-called "market necessity" exception. The meaning of this new idea is unclear since the court of appeals said only: "In short this concept holds that price-fixing is per se illegal except where it is absolutely necessary for the market to function at all," 562 F.2d at 136. We do not know quite what that means, but the court suggested it might mean that blanket licenses were allowable with respect to night clubs and skating rinks, among other licensees. The concept's only apparent rationale is that price fixing is allowable where costs of doing business (transaction costs) would otherwise be too high.

The market necessity defense manages to be at once too broad and too narrow. It is too broad because any defendant can raise it in any price fixing case—contending, for example, that price competition would increase uncertainties, and hence costs, to the point where the market would not function. The defense might almost invariably fail, but its availability would complicate trials and destroy the efficacy of the per se rules. Indeed, if the defense is accepted, it would be equally applicable to cases involving other per se rules—those, for example, against horizontal market divisions and concerted refusals to deal.

The concept of market necessity is also too narrow because it does not, so far as one can tell, permit agreements which greatly improve the efficiency of joint ventures but are not "absolutely essential" to the existence of some market. It is common, for example, that partners in a law firm agree not to take business individually in competition with the firm. That has always been thought a legal restraint because properly ancillary to a lawful joint venture. It makes the law firm a more efficient economic unit. But can it be said that such an agreement is "absolutely necessary" for the market for legal services to function at all? It would seem not. Thus, the per se rule against any elimination of price competition within a joint venture or economic integration would attack the most usual and useful forms of partnership, and the "market necessity defense" would fail to save them, though it would spill over into, and complicate the trials of, naked restraints as to which there has never before been any defense.

Conclusion

For the reasons stated, the petition for a writ of certiorari should be granted. Should the Court agree that the legal error committed by the majority of the court of appeals is clear, it may wish to consider summary reversal.

Respectfully submitted,

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May 12, 1978